

23/201



ASSOCIATION OF  
AMERICAN RAILROADS

Law Department  
Louis P. Warchot  
Senior Vice President-Law  
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October 28, 2011

ENTERED  
Office of Proceedings

OCT 28 2011

Part of  
Public Record

Honorable Cynthia T. Brown  
Chief, Section of Administration  
Surface Transportation Board  
395 E St., S.W.  
Washington, DC 20423

Re: STB Finance Docket No. 35506, Western Coal Traffic League—Petition for  
Declaratory Order

Dear Ms. Brown:

Pursuant to the Board's Order served September 28, 2011, attached please find the  
Opening Comments of the Association of American Railroads for filing in the above proceeding.

Respectfully submitted,

Louis P. Warchot  
*Counsel for the Association of  
American Railroads*

Attachment

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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STB Finance Docket No. 35506

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WESTERN COAL TRAFFIC LEAGUE—PETITION FOR DECLARATORY ORDER

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COMMENTS OF THE  
ASSOCIATION OF AMERICAN RAILROADS

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October 28, 2011

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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STB Finance Docket No. 35506

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WESTERN COAL TRAFFIC LEAGUE—PETITION FOR DECLARATORY ORDER

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COMMENTS OF THE  
ASSOCIATION OF AMERICAN RAILROADS

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**Introduction**

In a decision served September 28, 2011, the Surface Transportation Board (“Board”) initiated a declaratory order proceeding to address the “effect of the price that Berkshire Hathaway, Inc. (“Berkshire”) paid to acquire BNSF Railway Company in 2010 (“BNSF”) on the Board’s annual BNSF Uniform Railroad Costing System [“URCS”] and revenue adequacy determinations.” September 28, 2011 Order, Slip op. at 1 (“Order”). The proceeding was initiated in response to a petition filed May 2, 2011 by the Western Coal Traffic League (“WCTL”) requesting that the Board deviate from Generally Accepted Accounting Principles (“GAAP”) in establishing BNSF’s investment base after the Berkshire acquisition and instead declare that “it will exclude the write-up in BNSF’s net investment base attributable to the difference between the book value and the price that [Berkshire] paid to acquire BNSF in 2010, and make corresponding changes in BNSF’s annual URCS depreciation calculations.” *Id.* In its Order, the Board invited public comment on the issues raised and requested that parties “address the effect of the

subject net investment base write-up on the annual URCS and revenue adequacy determinations for BNSF beginning in the year 2010.” *Id.* at 3.<sup>1</sup>

The Association of American Railroads (“AAR”), on behalf of its member railroads, hereby submits these comments in response to the Board’s Order. The AAR believes that there is no sound basis for the Board to deviate from GAAP in this proceeding for purposes of valuing BNSF’s post-acquisition net investment base for URCS costing purposes and annual revenue adequacy determinations, and that WCTL’s petition for declaratory order should be denied.

The use of acquisition costs to value BNSF’s post-acquisition net investment base—not book value as proposed by WCTL—conforms with GAAP with respect to rail carrier purchase transactions and is required under 49 U.S.C. §§ 11142 and 11161 and the Board’s implementing regulations.<sup>2</sup> The use of acquisition costs is also supported by longstanding Board and Interstate Commerce Commission precedent,<sup>3</sup> the findings of the Railroad Accounting Principles Board,<sup>4</sup> and has been endorsed by the courts.<sup>5</sup> Moreover, there is no evidence to doubt that the purchase price paid by Berkshire for the acquisition

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<sup>1</sup> BNSF filed a reply in opposition to WCTL’s petition, noting, *inter alia*, that Board precedent supporting the use of acquisition cost issue is well-settled and that a declaratory order proceeding was unnecessary. BNSF urged, however, that should a declaratory order proceeding be initiated by the Board, it should not be limited to URCS costing issues but also include the corresponding issue of revenue adequacy. See *id.* at 3.

<sup>2</sup> 49 U.S.C. § 11142 requires that the Board, in prescribing its Uniform System of Accounts (“USOA”) for use by rail carriers, “[t]o the maximum extent practicable, ... conform such system to generally accepted accounting principles.” 49 U.S.C. § 11162 similarly requires that the Board conform its cost accounting rules to GAAP “to the maximum extent practicable.” The Board’s implementing regulations conform to this statutory requirement by prescribing use of acquisition costs for rail purchase transactions. See 49 C.F.R. § 1201.2-15.

<sup>3</sup> See, e.g., *CSX Corp.—Control—Conrail, Inc.*, 3 S.T.B. 196, 262-65 (1998) (“*Conrail*”); *Railroad Revenue Adequacy—1988 Determination*, 6 I.C.C. 2d 933, 935-42 (1990).

<sup>4</sup> See *Railroad Accounting Principles, Final Report*, Volume II -Detailed Report at 45-48 (RAPB) (Sept. 1, 1987).

<sup>5</sup> See, e.g., *Assoc. of Amer. RR’s v. ICC*, 978 F. 2d 737, 741-43 (D.C. Cir. 1992); *Erie-Niagara Rail Steering Comm. V. STB*, 247 F. 3d 437, 442-43 (2d Cir. 2001).

of BNSF was negotiated at arms-length by commercially sophisticated business entities and “represents by far the best evidence of the market value” of the BNSF’s net asset base at the time of acquisition.<sup>6</sup>

There is thus no sound reason for the Board to depart from long-standing statutory and regulatory requirements – as well as clear agency and judicial precedent – supporting use of GAAP to value BNSF’s net investment base for purposes of URCS costing and annual revenue adequacy determinations in this proceeding, and the Board should decline to do so.

Respectfully submitted,



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October 28, 2011

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<sup>6</sup> See *Conrail*, 3 S.T.B. at 265.

## CERTIFICATE OF SERVICE

I hereby certify that on this 28<sup>th</sup> day of October, 2011, I served by first class mail, postage prepaid, a copy of the forgoing on the following parties of record:

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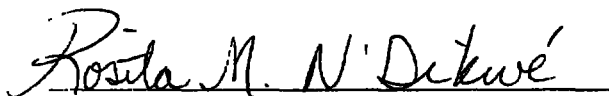
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